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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 PHILLIP ROSENBLUM, ) NO. SA CV 18-966-JVS(E)  
12 )  
13 Plaintiff, ) ORDER:  
14 )  
15 v. ) 1. DENYING MOTION TO DISMISS FOURTH  
16 JOSEPH BLACKSTONE, et al., ) AMENDED COMPLAINT; AND  
17 Defendants. ) 2. GRANTING REQUEST FOR SUBSTITUTION  
OF FICTITIOUS DEFENDANTS  
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18 Presently before the Court are: (1) a "Motion to Dismiss, etc."  
19 ("Motion to Dismiss"), filed November 6, 2019 by Defendants  
20 Blackstone, Porter, Serrano, Owens, Arredondo, Walewha, Moon and  
21 Villa; and (2) a "Request for Substitution of Parties" filed  
22 November 18, 2019 by Plaintiff. For the following reasons: (1) the  
23 Motion to Dismiss, which is deemed directed to the Fourth Amended  
24 Complaint, is denied; and (2) the Request for Substitution of Parties  
25 is granted.

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28 ///

**BACKGROUND**

Plaintiff, a state prisoner, filed this civil rights action pursuant to 42 U.S.C. section 1983 on June 1, 2018. Plaintiff's claims arise out of his confinement at the Orange County Jail in 2017. Despite the caption of the original Complaint (which names the "Orange County Sheriff Dept."), the body of the original Complaint identified the Defendants as Orange County Sheriff's Deputies Blackstone, Smith, Porter, Serrano, Owens and Arredondo and five fictitious "John Doe" Defendants, all sued in their individual capacities only. The original Complaint alleged claims for: (1) asserted "deliberate indifference" to the risk of assault by other inmates (based on alleged failure to protect Plaintiff from "set-up fights" assertedly occurring on July 4, 2017 (two incidents), August 28, 2018 and September 23, 2017); (2) asserted excessive force allegedly occurring on those same three dates; and (3) an alleged "campaign of harassment."

On July 9, 2018, the Court issued an "Order Dismissing Complaint with Leave to Amend." On August 9, 2018, Plaintiff filed a First Amended Complaint, identifying the Defendants as Deputies Blackstone, Smith, Porter, Serrano, Owens, Arrendondo [sic] and three fictitious "John Doe" Defendants, again all sued in their individual capacities only. The First Amended Complaint contained two federal constitutional claims for alleged deliberate indifference to the risk of harm from other inmates and alleged excessive force.

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1 On November 27, 2018, Defendants Blackstone, Porter, Serrano,  
2 Owens and Arredondo filed an Answer to the First Amended Complaint.  
3 On December 13, 2018, the Court issued an Order dismissing the action  
4 as against the unserved Defendant Smith without prejudice.  
5

6 Thereafter, the parties conducted discovery. Among other things,  
7 Defendants sought and obtained an order permitting them to depose  
8 Plaintiff (see ECF Docket Nos. 29, 33). Defendants also served  
9 document requests and interrogatories on Plaintiff.<sup>1</sup>  
10

11 On February 25, 2019, Plaintiff filed a "Motion to Amend  
12 Pleadings," accompanied by a proposed Second Amended Complaint,  
13 essentially seeking leave to amend to add as additional Defendants  
14 Sergeants Walewha and Martinez and two more fictitious "John Doe"  
15 Defendants. The proposed Second Amended Complaint purported to  
16 contain two claims: a combined constitutional and state law negligence  
17 claim based on the failure to protect allegations and a combined  
18 constitutional and state law negligence claim based on the excessive  
19 force allegations. On March 13, 2019, Defendants Blackstone, Porter,  
20 Serrano, Owens and Arredondo filed an Opposition to the "Motion to  
21 Amend Pleadings," arguing among other things that: (1) the proposed  
22 amendment allegedly was untimely and would cause undue and prejudicial  
23 delay; (2) the state law claims contained in the proposed Second  
24 Amended Complaint allegedly were insufficient and untimely under  
25 California's Government Claims Act; (3) the proposed Second Amended  
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27 <sup>1</sup> According to Defendants' March 13, 2019 Opposition to  
28 Plaintiff's "Motion to Amend Pleadings," Defendants served  
document requests and interrogatories on Plaintiff on  
December 23, 2018 (see ECF Docket No. 55, p. 4).

1 Complaint assertedly failed to allege Eighth Amendment claims as  
2 against the newly identified Defendants; and (4) the newly identified  
3 Defendants allegedly were entitled to qualified immunity. In opposing  
4 Plaintiff's motion to amend, Defendants Blackstone, Porter, Serrano,  
5 Owens and Arredondo did not contend that the federal claims against  
6 the existing Defendants were insufficient.

7  
8 On March 26, 2019, the Magistrate Judge issued a Minute Order  
9 granting Plaintiff's "Motion to Amend Pleadings" and ordering the  
10 Second Amended Complaint to be filed.

11  
12 On April 12, 2019, Plaintiff filed a "Request for Substitution of  
13 Parties," seeking leave to substitute Deputy Moon for Defendant John  
14 Doe #4 and Sergeant Villa for Defendant John Doe #5 in the Second  
15 Amended Complaint.

16  
17 On April 25, 2019, Defendants Blackstone, Porter, Serrano, Owens  
18 and Arredondo filed a "Motion to Dismiss and/or Strike Plaintiff  
19 Phillip Rosenblum's State Law Claims for Relief, etc." This motion  
20 challenged the sufficiency of only the state law claims contained in  
21 the Second Amended Complaint, on the grounds that: (1) the state law  
22 claims allegedly were untimely; (2) Plaintiff assertedly had failed to  
23 allege a "valid statutory basis" for the state law claims; (3) the  
24 Court allegedly should decline supplemental jurisdiction over the  
25 state law claims. Again, the moving Defendants did not challenge the  
26 sufficiency of the federal claims pleaded against them in the Second  
27 Amended Complaint.

1 On April 30, 2019, Defendants Blackstone, Porter, Serrano, Owens  
2 and Arredondo filed an Opposition to Plaintiff's "Request for  
3 Substitution of Parties." This Opposition argued, inter alia, that  
4 the Second Amended Complaint failed to state a federal claim against  
5 proposed Defendants Moon and Villa because: (1) Plaintiff assertedly  
6 alleged only a claim for mishandling and/or denial of grievances;  
7 (2) Plaintiff allegedly had no constitutional right to a particular  
8 classification, custody level or housing; and (3) proposed Defendants  
9 Moon and Villa allegedly were entitled to qualified immunity.

10  
11 On May 29, 2019, Defendant Joses Walewha filed a "Motion to  
12 Dismiss and/or Strike Plaintiff Phillip Rosenblum's Claims Against  
13 Defendant Walewha, etc." Such motion alleged that: (1) Plaintiff's  
14 state law claims allegedly were untimely, insufficiently pled under  
15 the Government Claims Act and failed to plead "a proper statutory  
16 basis"; (2) Plaintiff's allegations that Walewha assertedly failed to  
17 respond to and/or mishandled a grievance purportedly failed to alleged  
18 a due process claim; (3) Plaintiff allegedly had no constitutional  
19 right to a particular classification, custody level or housing; and  
20 (4) Defendant Walewha allegedly was entitled to qualified immunity.  
21 Defendant Walewha did not argue that the Second Amended Complaint  
22 failed sufficiently to allege federal claims against Walewha for  
23 failure to protect or excessive force.

24  
25 In the meantime, discovery continued. Plaintiff moved to quash a  
26 subpoena for production of documents, which the Magistrate Judge  
27 denied in an order which nonetheless limited the scope of the subject  
28 subpoena (ECF Docket Nos. 94, 119). Defendants Blackstone, Porter,

1 Serrano, Owens, Arredondo and Walewha unsuccessfully sought a  
2 protective order relieving Defendants of the obligation to respond to  
3 written discovery requests previously propounded by Plaintiff or,  
4 alternatively, prohibiting Plaintiff from requesting any further  
5 discovery in the future (ECF Docket No. 108, 127). Plaintiff filed a  
6 motion to compel discovery and another motion to quash a subpoena (ECF  
7 Docket Nos. 120, 121, 124).

8  
9       Thereafter, on August 1, 2019, the Court issued an "Order, etc."  
10 (1) denying the motion to dismiss the Second Amended Complaint filed  
11 by Defendants Blackstone, Porter, Serrano, Owens and Arredondo;  
12 (2) denying Defendants' motions to strike; (3) dismissing the state  
13 law claims against Defendant Walewha without leave to amend as  
14 untimely; (4) denying Defendant Walewha's motion to dismiss on the  
15 ground of qualified immunity; (5) rejecting Defendants' argument that  
16 the Court should decline to exercise supplemental jurisdiction at this  
17 stage of the litigation; and (6) granting Plaintiff's request to  
18 substitute Defendants Moon and Villa in place of John Doe #4 and John  
19 Doe #5, respectively, in the Second Amended Complaint. Among other  
20 things, the Court rejected Defendant Walewha's argument that Plaintiff  
21 had failed to allege a due process claim based on an asserted denial  
22 of grievances, observing that Plaintiff's claim was based on  
23 allegations that Walewha assertedly exhibited deliberate indifference  
24 to Plaintiff's safety by allegedly denying the grievance (see "Order,  
25 etc.," filed August 1, 2019 at p. 20). The Court also observed that  
26 Defendant Walewha had not challenged the sufficiency of the Second  
27 Amended Complaint to plead an Eighth Amendment violation against  
28 Walewha (id.). The Court ordered the moving Defendants to file

1 Answers to the Second Amended Complaint (with the exception of the  
2 portions of the Second Amended Complaint alleging state law claims  
3 against Walewha).

4  
5 On August 19, 2019, Defendants Blackstone, Porter, Serrano,  
6 Owens, Arredondo and Walewha filed an Answer to the Second Amended  
7 Complaint. Meanwhile, as the docket reflects, the parties continued  
8 to litigate discovery issues.

9  
10 On September 20, 2019, Plaintiff filed another "Motion to Amend  
11 Pleadings," seeking to file a Third Amended Complaint. Plaintiff  
12 sought to add as new Defendants the Orange County Sheriff's Department  
13 and sheriff's officials Van Patten, Castro, Longrob, Coleman, Luu,  
14 Chaviro and Laquian, based at least in part on information Plaintiff  
15 allegedly had received in discovery. The proposed Third Amended  
16 Complaint asserted claims against six fictitious "John Doe"  
17 Defendants. The proposed Third Amended Complaint also separated the  
18 federal claims from the state law claims, alleging four claims for  
19 relief (two federal constitutional claims and two state law negligence  
20 claims based on the alleged facts underlying the constitutional  
21 claims).

22  
23 On October 16, 2019, Defendants Blackstone, Porter, Serrano,  
24 Owens, Arredondo and Walewha filed an opposition to the "Motion to  
25 Amend Pleadings." The moving Defendants accused Plaintiff of undue  
26 delay, bad faith and a dilatory motive in seeking leave to amend. The  
27 moving Defendants also argued that amendment would prejudice the  
28 existing and proposed Defendants. The moving Defendants further

1 argued that amendment would be futile because: (1) any claim against  
2 the Orange County Sheriff's Department as a party allegedly would be  
3 untimely and would represent an improper attempt to "plead a dismissed  
4 party"; and (2) the claims against the new Defendants allegedly were  
5 untimely. The opposing Defendants did not argue that the proposed  
6 Third Amended Complaint failed to put Defendants on notice as to the  
7 nature of Plaintiff's claims or that the proposed Third Amended  
8 Complaint otherwise failed sufficiently to allege federal or state law  
9 claims.

10  
11 On October 18, 2019, the Magistrate Judge issued a Minute Order  
12 granting Plaintiff's "Motion to Amend Pleadings" and ordering the  
13 Third Amended Complaint to be filed. On that date the Magistrate  
14 Judge also issued an "Order Directing Service of Process of Third  
15 Amended Complaint, etc.," directing the United States Marshal to  
16 effect service of process on the newly added Defendants.<sup>2</sup>

17  
18 On November 6, 2019, Defendants "Blackston,"<sup>3</sup> Porter, Serrano,  
19 Owens, Arredondo, Walewha, Moon and Villa filed a "Motion to Dismiss  
20 Plaintiff's Third Amended Complaint Pursuant to FRCP Rule 8 and  
21

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22 <sup>2</sup> As of the date of this Order, no proofs of service  
23 reflecting service of the Summons and Third Amended Complaint on  
24 the Defendants added in the Third Amended Complaint have been  
filed, and those Defendants have not appeared in the action.

25 <sup>3</sup> The caption and body of this document spell Defendant  
26 Blackstone's name as "Blackston." Defendants contend Plaintiff  
27 erroneously sued Blackston as "Blackstone" (see Motion to  
28 Dismiss, p. 7 n.1). Yet, Defendants have spelled this  
Defendant's name as "Blackstone" for over a year and have  
continued periodically to do so even after the filing of the  
Motion to Dismiss. Given these confusing circumstances, the  
Court uses the name "Blackstone" herein.



1 (12(b)(6), etc." (the pending "Motion to Dismiss").

2  
3 On November 18, 2019, Plaintiff filed a "Request for Substitution  
4 of Parties," seeking to substitute Sergeant A. Montoya for Defendant  
5 John Doe #4 and Sergeant D. Braham for Defendant John Doe #5. Also on  
6 November 18, 2019, Plaintiff filed a "Declaration in Support of  
7 Substitution of Corrected Third Amended Complaint, etc.," accompanied  
8 by a proposed corrected "Third Amended Complaint." On December 2,  
9 2019, Plaintiff filed an "Opposition to Defendants['] Motion to  
10 Dismiss Plaintiff's Third Amended Complaint."

11  
12 On December 10, 2019, Defendants "Blackstone [sic]," Porter,  
13 Serrano, Owens, Arredondo, Walewha, Moon and Villa filed "Defendants'  
14 Non-Opposition to Plaintiff's to [sic] Substitute Corrected Third  
15 Amended Complaint." Also on December 10, 2019, Defendants "Blackstone  
16 [sic]," Porter, Serrano, Owens, Arredondo, Walewha, Moon and Villa  
17 filed "Defendants' Opposition to Plaintiff's Motion to Substitute A.  
18 Montoya and D. Braham, etc."

19  
20 On December 12, 2019, the Magistrate Judge ordered that the  
21 "Third Amended Complaint" attached to Plaintiff's "Declaration in  
22 Support of Substitution of Corrected Third Amended Complaint etc.," be  
23 filed as Plaintiff's Fourth Amended Complaint. The Magistrate Judge  
24 also ordered that Defendants' "Motion to Dismiss Plaintiff's Third  
25 Amended Complaint, etc.," and Plaintiff's "Opposition, etc." thereto,  
26 be construed, respectively, as Defendants' Motion to Dismiss the  
27 Fourth Amended Complaint and Plaintiff's Opposition thereto.

28 **SUMMARY OF ALLEGATIONS OF FOURTH AMENDED COMPLAINT**

1 Plaintiff alleges:  
2

3 **Claim One (Failure to Protect from Inmate Assault)**  
4

5 In May of 2017, Plaintiff returned to the Orange County  
6 Jail "for a parole violation" (Fourth Amended Complaint,  
7 attachment, ¶ 2). Plaintiff told a housing deputy (not a  
8 Defendant) that Plaintiff had "enemy concerns" regarding  
9 multiple jail inmates who previously had attempted to, or  
10 wanted to, assault Plaintiff (id.). Because of these "enemy  
11 concerns," the deputy housed Plaintiff in "J-Med," a  
12 protective unit where Plaintiff would be celled safely  
13 behind protective glass, rather than in a "Main Jail" cell  
14 with bars that inmates could "fight through" (id.).  
15

16 On June 30, 2017, deputies acting in reckless disregard  
17 for Plaintiff's safety moved Plaintiff into the Main Jail,  
18 which was filled with Plaintiff's enemies (id., ¶ 3).  
19 Initially, Plaintiff was housed on the tier below Michael  
20 Baker, one of Plaintiff's known enemies (id.). Baker told  
21 everyone Plaintiff was a "rat" because Plaintiff was a  
22 confidential informant in Baker's case (id.).  
23

24 On June 2, 2017 and June 3, 2017, Plaintiff filed  
25 grievances seeking to be rehoused in J-Med away from enemies  
26 in the Main Jail whom Plaintiff listed in the grievances,  
27 including Baker (id., ¶ 4). The July 2, 2017 grievance was  
28 hand delivered to Defendant Moon, who acted with "reckless

disregard" and "deliberate indifference" by failing to turn in the grievance, so that the grievance was never answered (id.). On July 3, 2017, Plaintiff resubmitted the grievance (id.). Defendant Villa acted with "reckless disregard" and "deliberate indifference" by simply commenting on the "screen out response" that Plaintiff had requested to be housed in "med J" (id.). On July 4, 2017, Plaintiff was rehoused in the "direct vicinity" of Plaintiff's "known enemies" (id.).

#### **The First "Set-up Fight"**

The first "set-up fight" occurred on the morning of July 4, 2017 (id.). At that time, Plaintiff was housed on the same tier and in the direct vicinity of his known enemy, Alfredo Aquino (id.).<sup>[4]</sup> In October of 2016, Aquino had attempted to "razor slice" Plaintiff through the Main Jail cell bars and had thrown bodily fluids on Plaintiff (id.). Defendant John Doe #1, a classification deputy, selected Plaintiff's housing to be in the proximity of this known enemy (id.). Defendant John Doe #4, a supervisor, approved the housing decision (id.).

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Upon entering the unit, Plaintiff tried to tell the unit deputy, Defendant Coleman, that Plaintiff had multiple

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<sup>4</sup> Identified as "McKinno" in Plaintiff's earlier pleadings (see Second Amended Complaint, attachment ¶ 5; First Amended Complaint, attachment, ¶ 5.

1 enemies in the Main Jail (id.). Acting with "reckless  
2 disregard" and "deliberate indifferen[ce]," Coleman ordered  
3 Plaintiff into Main Jail housing (id.). As Plaintiff  
4 approached Aquino's cell, a fight broke out between  
5 Plaintiff and Aquino (id.).  
6

### 7 **The Second "Set-up Fight"**

8

9 The second "set-up fight" occurred on the evening of  
10 July 4, 2017 (id., ¶ 6). Plaintiff was rehoused on the same  
11 tier in the direct vicinity of his known enemies "J.J.  
12 Renteria (Eric Salinas)"<sup>5</sup> and Matthew Drogno (id.). In  
13 October of 2016 Renteria had attempted to "razor slice"  
14 Plaintiff through the cell bars and Drogno had attempted to  
15 assault Plaintiff through the cell bars (id.). Defendant  
16 John Doe #2, a classification deputy, selected Plaintiff's  
17 housing to be with his "known enemies," and Defendant John  
18 Doe #5, a supervisor, approved this housing decision (id.).  
19

20 On the evening of July 4, Plaintiff attempted to tell  
21 the deputy in charge of the unit, Defendant Porter, that  
22 Plaintiff had multiple enemies in the Main Jail (id.).  
23 Porter nevertheless acted with "reckless disregard" and  
24 "deliberate indifferen[ce]" by ordering Plaintiff into Main  
25 Jail housing (id.). When Plaintiff approached Renteria's  
26

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27 <sup>5</sup> Identified as "Salinas" in Plaintiff's earlier  
28 pleadings (see First Amended Complaint, attachment ¶ 6; Second  
Amended Complaint, attachment ¶ 6).

1 cell, a fight broke out almost immediately between Renteria  
2 and Plaintiff (id.). Drogno intervened and hit Plaintiff  
3 multiple times on the head with a homemade stick resembling  
4 a "mini-bat" or pipe (id.).  
5

### 6 **The Third "Set-up Fight"**

7

8 The third set-up fight occurred on the morning of  
9 August 28, 2017 (id., ¶ 10).<sup>6</sup> Previously, on July 16, 2017,  
10 Plaintiff had submitted a grievance to Defendant Van Patten,  
11 alleging that inmate Raymond Boykin had made intimidating  
12 remarks to Plaintiff and had harassed Plaintiff by pushing  
13 cardboard penises in front of Plaintiff's cell door and by  
14 filling out fake medical slips in Plaintiff's name claiming  
15 Plaintiff was suicidal and was threatening an officer (id.).  
16 Van Patten screened out the grievance and gave it to  
17 Defendant Martinez, who returned it to Plaintiff on  
18 August 6, 2017, saying that the grievance did not make sense  
19 (id.). Martinez also mocked Plaintiff's grievance on  
20 July 26, 2017, telling Plaintiff "how come you don't feel  
21 safe behind your door, your sentences don't make sense, do  
22 you want me to read it out loud" (id.).  
23

24 Also previous to the August 28, 2017 "set-up fight," on  
25

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26 <sup>6</sup> Although Plaintiff refers to the August 28, 2017 fight  
27 as the "fourth" fight and the September 23, 2017 fight as the  
28 "third" fight (see Fourth Amended Complaint, attachment ¶ 10),  
the Court recites Plaintiff's allegations in chronological order  
for greater clarity.

1 August 24, 2017 Plaintiff had engaged in a verbal  
2 altercation with Boykin ("aggressive trash talking") as a  
3 result of which Defendant Blackstone had yanked Plaintiff by  
4 the shirt collar into a nearby hallway (id.).  
5

6 On August 28, 2017, Plaintiff was being escorted to  
7 court with Plaintiff's known enemy Boykin (id.). Plaintiff  
8 was cuffed behind his back (id.). Boykin was in waist  
9 chains, "making striking an availability for him" (id.).  
10 Defendant Blackstone allowed Boykin to stand behind  
11 Plaintiff in an elevator, then walked away and left the two  
12 inmates in the elevator unmonitored (id.). Boykin sliced  
13 Plaintiff's forearm with a razor blade (id.). Plaintiff  
14 then turned and kicked Boykin (id.). Blackstone intervened,  
15 but ultimately let go of Plaintiff and walked away,  
16 impliedly authorizing the fight to continue (id.).  
17

#### 18 **The Fourth "Set-up Fight"** 19

20 The fourth "set-up fight" occurred on the morning of  
21 September 23, 2017 between Plaintiff and his "known enemy"  
22 Michael Baker (id., ¶ 7). Between June 30, 2017 and July 3,  
23 2017, Baker had called Plaintiff a "rat" multiple times and  
24 had made threatening remarks (id.). On July 16, 2017,  
25 Defendant Van Patten acted with "deliberate indifference"  
26 and "reckless disregard" by failing to document that Baker  
27 was Plaintiff's enemy or that Plaintiff had told Van Patten  
28 that Plaintiff "had been set-up to fight other inmates in

1 the jail" (id.). Furthermore, although Plaintiff had spoken  
2 with Defendant Arredondo several times prior to the  
3 September 23, 2017 incident, Arredondo acted with  
4 "deliberate indifference" and "reckless disregard" by  
5 failing to document that Baker was Plaintiff's enemy (id.).  
6 Although Plaintiff told Defendants Luu, Chaviro, Laquian and  
7 Castro that Plaintiff had multiple enemies in the Main Jail,  
8 these Defendants nevertheless caused Plaintiff to be  
9 rehoused on a tier with Plaintiff's "known enemy" Michael  
10 Baker (id.). Defendant John Doe #3, a classification  
11 deputy, and John Doe #6, a supervisor, allowed Plaintiff to  
12 be housed with his known enemy (id.).  
13

14 On September 12, 2017, Defendant Walewha disregarded  
15 Plaintiff's grievance requesting not to be placed in Baker's  
16 vicinity due to the potential for violence (id.). The acts  
17 of Defendants Moon and Villa in mishandling Plaintiff's  
18 grievances renders them liable for the September 23, 2017  
19 fight as well as the July 4, 2017 fights because Plaintiff  
20 referred to Baker in the grievances (id., ¶ 8).  
21

22 One day before the fight, on September 22, 2017,  
23 Defendants Arredondo and Owens attempted to rehouse  
24 Plaintiff with known enemies, but Plaintiff "refused to go"  
25 (id., ¶ 9). On September 23, 2017, as Plaintiff approached  
26 Baker's cell, a fight broke out almost immediately between  
27 Plaintiff and Baker (id., ¶ 7).  
28

1        **Claim Two (Excessive Force)**

2  
3        **The First Incident**

4  
5        On July 4, 2019, after Plaintiff's fight with Renteria  
6        and Drogno, Defendants Porter, Longrob, Serrano and Smith  
7        restrained Plaintiff (id., ¶ 12).<sup>7</sup> While these Defendants  
8        were handcuffing Plaintiff (who was lying face down on the  
9        ground), these Defendants applied "breaking pressure" to  
10       Plaintiff's hands and feet, causing "the feeling of a  
11       fracture" in Plaintiff's right wrist and nerve damage to  
12       Plaintiff's right thumb which lasted six weeks (id.).  
13       Plaintiff also was hit in the head off camera while being  
14       escorted down the stairs (id.). On camera, Plaintiff was  
15       slammed face first into the wall (id.).  
16

17       **The Second Incident**

18  
19       After inmate Boykin sliced Plaintiff with a razor on  
20       August 28, 2017, Plaintiff kicked Boykin (id., ¶ 13).  
21       Defendant Blackstone then slammed Plaintiff's head into the  
22       elevator wall and forced Plaintiff's shoulder into the wall  
23       (id.). When Plaintiff, who was handcuffed behind his back,  
24       kicked again at Boykin, Blackstone grabbed Plaintiff and  
25       tossed Plaintiff to the ground face first (id.). Plaintiff  
26       suffered an injury to his chin, multiple broken teeth and  
27

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28       <sup>7</sup> As previously indicated, the Court dismissed Defendant  
Smith from the action.



1 misalignment of his jaw (id.). Blackstone followed County  
2 policy concerning the use of force, thus making the Orange  
3 County Sheriff's Department responsible for Blackstone's  
4 actions (id.).  
5

### 6 **The Third Incident**

7

8 On September 22, 2017 Plaintiff refused to be rehoused  
9 back in the vicinity of his known enemies (id., ¶ 14).  
10 Defendants Arredondo and Owens were going to perform a  
11 filmed escort of Plaintiff to his new housing (id.). The  
12 filming did not occur, because as soon as Plaintiff refused  
13 to move, Defendant Owens entered Plaintiff's cell, slammed  
14 Plaintiff into the wall, and then took Plaintiff to the  
15 ground (id.). Defendant Blackstone knelt on Plaintiff's  
16 back, and both Blackstone and Owens dropped their weight  
17 onto Plaintiff (id.). Defendant Arredondo stood by and  
18 failed to intervene, thus authorizing the excessive force  
19 (id.).  
20

21 The Fourth Amended Complaint contains the following "Counts":  
22

23 1. Failure to protect Plaintiff from the risk of inmate attack,  
24 allegedly in violation of the Eighth Amendment, against Defendants  
25 Blackstone, Porter, Owens, Arredondo, Walewha, Moon, Villa, Sergeant  
26 Martinez, Van Patten, Castro, Coleman, Luu, Chaviro, Laquian and Does  
27 #1 - #6 (Count One);  
28

///  
17

1           2. Excessive force allegedly in violation of the Eighth  
2 Amendment against Defendants Blackstone, Arredondo, Porter, Owens,  
3 Serrano, Longrob and Orange County Sheriff's Department (Count Two);  
4

5           3. Negligence based on the failure to protect allegations  
6 against Defendants Blackstone, Arredondo, Porter, Owens and Does #1 -  
7 #6 (Count Three); and  
8

9           4. Negligence based on the excessive force allegations against  
10 Defendants Blackstone, Arredondo, Porter, Owens, Serrano, Longrob and  
11 Orange County Sheriff's Department (Count Four).  
12

### 13   **MOTION TO DISMISS**

#### 14 15           I. Defendants' Contentions 16

17           In contrast to some of their previous filings, moving Defendants  
18 now attack the sufficiency of Plaintiff's allegations to state  
19 constitutional claims of "deliberate indifference" and excessive force  
20 and to state cognizable negligence claims. Defendants contend:  
21

22           1. The Third Amended Complaint assertedly fails to allege the  
23 deliberate indifference of Defendants Moon, Villa, Porter, Walewha,  
24 Arredondo or Blackstone;  
25

26           2. The Third Amended Complaint assertedly fails to allege that  
27 Plaintiff suffered any harm from the September 22, 2017 incident  
28 alleged against Defendants Owens and Arredondo;

1           3. A prisoner assertedly does not have a right to grievances  
2 "handled according to his preferences";

3  
4           4. Plaintiff has failed to allege a cognizable excessive force  
5 claim with respect to any of the four alleged incidents; and

6  
7           5. Plaintiff's negligence claims assertedly are insufficient.  
8

9 **II. Standards Governing Motion to Dismiss**

10  
11           Federal Rule of Civil Procedure 8(a)(2) requires only  
12 that a plaintiff provide "a short and plain statement of the  
13 claim showing that the pleader is entitled to relief," such  
14 that the defendant receives "fair notice" of the claims  
15 against it. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555,  
16 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (citation  
17 omitted). A sufficiently pleaded cause of action "requires  
18 more than labels and conclusions, and a formulaic recitation  
19 of the elements of a cause of action will not do." Id.  
20 Rather, "[f]actual allegations must be enough to raise a  
21 right to relief above the speculative level." Id.; see also  
22 Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173  
23 L. Ed. 2d 868 (2009). The requirement that a plaintiff  
24 provide "plausible grounds" for her claim does not, however,  
25 "impose a probability requirement at the pleading stage."  
26 Twombly, 550 U.S. at 556, 127 S. Ct. 1955. On the contrary,  
27 "a well-pleaded complaint may proceed even if it strikes a  
28 savvy judge that actual proof of those facts is improbable,

1 and that a recovery is very remote and unlikely." Id.

2 (internal quotation marks omitted).

3  
4 Williams v. Yamaha Motor Co. Ltd., 851 F.3d 1015, 1025 (9th Cir.  
5 2017).

6  
7 On motion to dismiss, the Court "must accept as true all of the  
8 factual allegations contained in the complaint." Erickson v. Pardus,  
9 551 U.S. 89, 94 (2007) (citations omitted); Zucco Partners, LLC v.  
10 Digimatic Corp., 552 F.3d 981, 989 (9th Cir. 2009) (on motion to  
11 dismiss, court takes as true all non-conclusory factual allegations in  
12 the complaint and construes the complaint in the light most favorable  
13 to the plaintiff). "[T]he entitlement to the presumption of truth,  
14 allegations in a complaint or counterclaim may not simply recite the  
15 elements of a cause of action, but must contain sufficient allegations  
16 of underlying facts to give fair notice and to enable the opposing  
17 party to defend itself effectively." Levitt v. Yelp! Inc., 765 F.3d  
18 1123, 1135 (9th Cir. 2014). "[T]he factual allegations that are taken  
19 as true must plausibly suggest an entitlement to relief, such that it  
20 is not unfair to require the opposing party to be subjected to the  
21 expense of discovery and continued litigation." Id. (citation  
22 omitted). However, a plaintiff is not necessarily required to allege  
23 facts supporting every element of a particular claim. See Montanes v.  
24 Inventure Foods, 2014 WL 3305578, at \*6-7 (C.D. Cal. July 2, 2014)  
25 ("Lower courts and treatises agree that a Rule 12(b)(6) need not be  
26 granted solely because a complaint fails to plead facts supporting  
27 each element of a claim.") (citations omitted). The Court must  
28 construe a pro se litigant's pleading liberally and hold a pro se

1 plaintiff "to less stringent standards than formal pleadings drafted  
2 by lawyers." Erickson v. Pardus, 551 U.S. at 94 (citation omitted).

3  
4 "Generally, a court may not consider material beyond the  
5 complaint in ruling on a Fed. R. Civ. P. 12(b)(6) motion." Intri-Plex  
6 Technologies, Inc. v. Crest Group, Inc., 499 F.3d 1048, 1052 (9th Cir.  
7 2007) (citation and footnote omitted). The Court may consider "only  
8 allegations contained in the pleadings, exhibits attached to the  
9 complaint, and matters properly subject to judicial notice." Akhtar  
10 v. Mesa, 698 F.3d 1202, 1212 (9th Cir. 2012) (citation omitted).

11  
12 **III. Analysis**

13  
14 **A. Federal Claims Against Defendants Blackstone, Porter,**  
15 **Serrano, Owens and Arredondo**

16  
17 As previously indicated, Defendants Blackstone, Porter, Serrano,  
18 Owens and Arredondo previously filed an Answer to the First Amended  
19 Complaint. The First Amended Complaint contained factual allegations  
20 similar to those contained in the operative Fourth Amended Complaint  
21 (see First Amended Complaint, filed August 9, 2018, ¶¶ 5-12 and  
22 attachments). Furthermore, Defendants Blackstone, Porter, Serrano,  
23 Owens, Arredondo and Walewha previously filed motions to dismiss the  
24 Second Amended Complaint without challenging the sufficiency of the  
25 failure to protect and excessive force allegations contained therein.  
26 The Second Amended Complaint contained allegations similar to those  
27 contained in the Fourth Amended Complaint.

28 ///

Courts have disagreed on the issue of whether a court should entertain a defendant's new motion to dismiss an amended pleading when the defendant previously filed an answer or a motion to dismiss and the grounds asserted in the new motion were available to the defendant at the time of the previous filing(s). See Townsend Farms v. Goknur Gida Madderleri Enerji Imalat Ithalat Ihracat Ticaret Ve Sanayi A.S., 2016 WL 10570248, at \*5-6 (C.D. Cal. Aug. 17, 2016) (defendants waived ability to challenge, on a post-answer motion to dismiss an amended complaint, the sufficiency of a claim asserted in the previous pleading which defendants had answered); Securities and Exchange Commission v. Hui Feng, 2016 WL 7443222, at \*3 (C.D. Cal. Aug. 4, 2016) (defendants' filing of an answer four months prior to filing a motion for judgment on the pleadings showed defendants were able to defend against fraud claim based on the allegations in the complaint); Brooks v. Caswell, 2016 WL 866303, at \*3 (D. Ore. Mar. 7, 2016) ("Allowing a post-answer motion to dismiss an amended complaint where the amendment merely substantiates existing claims would render the Rule 12(b) restriction on post-answer motions meaningless. As such, this court follows many other circuits and district courts across the country which have held that an amended complaint does not revive the right to file a post-answer motion to dismiss, with the exception that new claims may be attacked."); Brain Life, LLC v. Elekta, Inc., 2012 WL 48024, at \*2 (S.D. Cal. Jan. 6, 2012) ("Brain Life") (granting motion to strike a motion to dismiss an amended complaint made after the filing of an answer to a previous complaint; "[i]f [defendant] were to get its way, defendants in multiple-defendant cases could repeatedly revise their tactical approach when, fortuitously, the claims against another defendant are dismissed without prejudice and a

1 plaintiff is granted leave to amend. The potential for gamesmanship  
2 and delay would be great, particularly in cases involving numerous  
3 defendants in which a plaintiff is given multiple opportunities to  
4 amend."); compare Appel v. Boston Nat. Title Agency, LLC, 2019 WL  
5 3858888, at \*3 (S.D. Cal. Aug. 15, 2019) (defendant who filed answer  
6 to initial complaint permitted to make motion to dismiss amended  
7 complaint, where plaintiff expanded its claims in amended complaint  
8 and defendant moved to dismiss only when it had obtained information  
9 supporting a defense); Miller v. Fuhu Inc., 2015 WL 2085490, at \*6-7  
10 (C.D. Cal. May 3, 2015) (motion to dismiss amended complaint not  
11 untimely despite filing of answer to prior complaint; distinguishing  
12 Brain Life). The Ninth Circuit has not directly addressed this issue.  
13 However, the Ninth Circuit has suggested that a court has discretion  
14 to entertain a motion to dismiss an amended complaint following a  
15 previous motion to dismiss an earlier, superseded complaint. See In  
16 re Apple iPhone Antitrust Litigation, 846 F.3d 313, 317-20 (9th Cir.  
17 2017), aff'd on other grounds, 139 S. Ct. 1514 (2019) (ruling that,  
18 under Rule 12(h)(2) of the Federal Rules of Civil Procedure, if a  
19 "failure-to-state-a-claim defense" was not raised in a first motion to  
20 dismiss under Rule 12(b)(6), it thereafter can be raised only in a  
21 pleading, a post-answer motion or at trial; however, because denying a  
22 late-filed Rule 12(b)(6) motion can cause delay, a court may entertain  
23 such a motion, at least where the motion was not filed for a  
24 "strategically abusive purpose" and delay would have "no apparent  
25 purpose"; district court's decision to allow late-filed motion to  
26 dismiss based on a standing argument deemed harmless).

27 ///

28 ///

1       The Ninth Circuit's decision in In re Apple iPhone Antitrust  
2 Litigation does not necessarily authorize this Court to determine the  
3 merits of the sufficiency challenges to the federal claims in the  
4 Fourth Amended Complaint raised by Defendants Blackstone, Porter,  
5 Serrano, Owens and Arredondo. These Defendants do not base their  
6 sufficiency challenges on a legal ground such as standing, but simply  
7 argue that the pleading does not suffice under federal pleading  
8 standards. Again, Defendants so allege despite the fact that they  
9 previously answered an earlier complaint containing the same or  
10 similar factual allegations and previously filed a motion to dismiss  
11 which did not contain the present sufficiency challenges.

12  
13       The alleged insufficiency of Plaintiff's federal claims has not  
14 prevented Defendants from engaging in vigorous discovery. "A  
15 complaint guides the parties' discovery, putting the defendant on  
16 notice of the evidence it needs to adduce in order to defend against  
17 the plaintiff's allegations." OTR Wheel Engineering, Inc. v. West  
18 Worldwide Servs., Inc., 897 F.3d 1008, 1024 (9th Cir. 2018) (citation  
19 and internal quotations omitted). Defendants clearly have, and have  
20 had, notice of the evidence needed to defend against Plaintiff's  
21 allegations in this case.

22  
23       Under the circumstances, these Defendants' arguments that the  
24 Fourth Amended Complaint is insufficient to state plausible claims  
25 against them ring hollow and lack merit. The Motion to Dismiss is  
26 denied with respect to Defendants Blackstone, Porter, Serrano, Owens  
27 and Arredondo.

28     ///



1        **B. Federal Claims Against Defendants Moon and Villa**

2

3        As set forth above, Plaintiff alleges that Defendants Moon and

4 Villa failed to protect Plaintiff by mishandling two grievances

5 Plaintiff allegedly submitted prior to the "set-up fights." In these

6 grievances, Plaintiff reportedly had sought to be rehoused away from

7 his enemies. Defendants Moon and Villa contend that the Fourth

8 Amended Complaint fails to state a claim for relief under Eighth

9 Amendment standards (Motion to Dismiss, pp. 14-15).

10

11        To the extent Defendants Moon and Villa contend that Plaintiff

12 alleges only a mishandling of a grievance not amounting to a due

13 process violation (see Motion to Dismiss, pp. 17-18), Defendants are

14 mistaken. The Court previously rejected Defendant Walewha's similar

15 construction of similar allegations contained in the Second Amended

16 Complaint (to the effect that Walewha allegedly disregarded

17 Plaintiff's grievance seeking not to be placed in inmate Baker's

18 vicinity) (see "Order, etc.," filed August 1, 2019, pp. 20-21). In

19 his Opposition, Plaintiff reiterates that his claims against Moon and

20 Villa are not based simply on an alleged mishandling of grievances but

21 rather on these Defendants' alleged failure to protect Plaintiff from

22 the attacks that followed the asserted failure to process the

23 grievances (Opposition, p. 3).

24

25        The Eighth Amendment's prohibition against cruel and unusual

26 punishment applies only after conviction. See Pierce v. Multnomah

27 County, Oregon, 76 F.3d 1032, 1042 (9th Cir.), cert. denied, 519 U.S.

28 1006 (1996); see also Kingsley v. Hendrickson, 135 S. Ct. 2466, 2475

(2015) ("Kingsley"). A pretrial detainee's challenge to jail conditions is governed by the due process clause, not the Eighth Amendment. See Kingsley, 135 S. Ct. at 2475 (excessive force claim); Castro v. County of Los Angeles, 833 F.3d 1060, 1068-69 (9th Cir. 2016) (en banc), cert. denied, 137 S. Ct. 831 (2017) (claim that jail officials failed to protect inmate from assault by another inmate).

Based on Plaintiff's prior allegation that the alleged wrongdoing occurred following Plaintiff's return to the jail "for a probation violation," the Court previously indicated that the Eighth Amendment standard applied to Plaintiff's claims (see "Order, etc." filed August 1, 2019, pp. 22-23 & n.5; Second Amended Complaint, p. 5 & attachment p. 1). The parties have not argued otherwise. However, it appears that, during the period of the alleged wrongdoing, Plaintiff may have been detained at the jail on pending probation violation proceedings, rather than as a result of a court order deeming Plaintiff to have violated his probation.<sup>8</sup>

---

<sup>8</sup> The Court takes judicial notice of the docket and documents filed in Petitioner's habeas corpus action in this Court, Rosenblum v. Biter, SA CV 19-758-JVS(E). See Mir v. Little Company of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988) (court may take judicial notice of court records). The lodgments in that habeas action show that:

In 2015, a jury found Plaintiff guilty of attempted robbery and misdemeanor battery (Court of Appeal Case No. G052041, Reporter's Transcript (Respondent's Lodgment 1, Part 5), at 1068-70; Clerk's Transcript (Respondent's Lodgment 3, Part 2), at 433-34). The court suspended sentence and imposed three years' probation (Court of Appeal Case No. G052041, Reporter's Transcript (Respondent's Lodgment 1, Part 5), at 1126-34).

On May 1, 2017, the State charged Plaintiff with a probation violation, i.e., battery on a bus operator (Court of Appeal Case No. G055848, Clerk's Transcript (Respondent's

(continued...)

1       The issue of whether a person confined during the pendency of  
 2 probation violation proceedings should be treated as a pretrial  
 3 detainee or a convicted prisoner for purposes of a constitutional  
 4 challenge to jail conditions is an issue upon which courts have  
 5 differed. See Reinoso-Delacruz v. Ruggerio, 2019 WL 2062434, at \*2-3  
 6 (D. Conn. May 9, 2019) (inmate awaiting determination of probation  
 7 violation proceedings considered a pretrial detainee for purposes of  
 8 evaluating claim that jail officials failed to protect inmate from  
 9 assault by a fellow inmate); Chrisco v. Hayes, 2017 WL 5404191, at \*4  
 10 (D. Colo. Nov. 14, 2017) ("Pretrial detainees include incarcerated  
 11 individuals awaiting trial on pending criminal charges and individuals  
 12 awaiting adjudication on pending accusations that they have violated  
 13 the terms of their probation or parole.") (citations omitted); Hill v.  
 14 County of Montgomery, 2018 WL 2417839, at \*2 (N.D.N.Y. May 29, 2018)  
 15 (status of inmate whose probation violation proceedings were pending  
 16 "more akin to that of a pretrial detainee") (dictum; citing cases);  
 17 Weishaar v. County of Napa, 2016 WL 7242122, at \*6-7 (N.D. Cal.  
 18 Dec. 15, 2016) (jail inmate arrested for probation violation deemed to  
 19 be a pretrial detainee for purposes of claim that jail officials  
 20 failed to take measures to prevent inmate's suicide); compare Ford v.  
 21 Grand Traverse County, 2005 WL 2572025, at \*1 n.1 (W.D. Mich. Oct. 12,  
 22 2005) (Eighth Amendment standard applied); see also Palmer v. Marion  
 23 County, 327 F.3d 588, 592-93 (7th Cir. 2003) (pre-Kingsley case noting  
 24 "uncertainty" in the law but deeming issue "purely academic" because,

---

26       <sup>8</sup>(...continued)

27       Lodgment 11), at pp. 96-98). On November 28, 2017, after the  
 28       incidents alleged in the Fourth Amended Complaint, the court  
       found Plaintiff in violation of his probation and imposed a  
       prison sentence (id., at 270-71).

1 at that time, the Eighth Amendment and due process standards were the  
2 same); Brown v. Harris, 240 F.3d 383, 388 (4th Cir. 2001) (admitting  
3 to "some uncertainty" on the issue). In the only directly related  
4 Ninth Circuit case, a pre-Kingsley unpublished decision, the Ninth  
5 Circuit applied the due process reasonableness standard to a claim of  
6 excessive force during an inmate's "pre-hearing detention for a  
7 probation violation." Ressy v. King County, 520 Fed. App'x 554, at \*1  
8 (9th Cir. 2013).

9  
10 In the present case, Plaintiff's allegations are sufficient under  
11 either the Eighth Amendment standard or the due process standard.  
12 Plaintiff attaches to the Fourth Amended Complaint a grievance, dated  
13 July 3, 2017, in which Plaintiff requested a housing move to "module  
14 'J'" (Fourth Amended Complaint, second exhibit). This document,  
15 although somewhat difficult to read, contains Plaintiff's allegations  
16 that he had enemies at the jail with whom he previously had had  
17 "violent altercations" and "gassing attacks" (id.). Plaintiff  
18 identified the enemies, among others, as Baker and Renteria, and said  
19 "D.I.A. [sic]" had the "enemies'" names (id.). The document appears  
20 to reflect that Defendant Villa received the document on July 3, 2017  
21 and bears a check in the box marked "handled as inmate request" (id.).  
22 The document does not indicate that the grievance was assigned to any  
23 jail official or that any response was returned to Plaintiff (id.).  
24 Liberally construed, Plaintiff's allegations, together with the  
25 exhibit described above, indicate that Defendant Moon failed to turn  
26 in this grievance, and that, after Plaintiff allegedly resubmitted the  
27 grievance, Defendant Villa simply screened out the grievance. The  
28 contents of the grievance indicated that violence previously had

1 occurred between Plaintiff and other inmates including Baker and  
2 Renteria (by name) and others (on a referenced jail listing). For  
3 purposes of a motion to dismiss, these allegations suffice to allege:  
4 (1) the objective unreasonableness of the asserted failure of Moon and  
5 Villa to process the grievance so that Plaintiff could be moved away  
6 from his enemies; and (2) the subjective awareness of Moon and Villa  
7 that Plaintiff would be in danger of physical attack if he were not  
8 moved away from his enemies. Hence, the Fourth Amended Complaint  
9 suffices to plead either an Eighth Amendment claim or a due process  
10 claim against Moon and Villa.

11  
12 **C. State Law Claims Against All Defendants**

13  
14 The Fourth Amended Complaint contains two negligence claims.  
15 Plaintiff asserts "Count Three" for negligence based on the failure to  
16 protect allegations, against Defendants Blackstone, Porter, Arredondo,  
17 Owens and Does #1 through #6. Plaintiff asserts "Count Four" for  
18 negligence based on the excessive force allegations, against  
19 Defendants Blackstone, Porter, Serrano, Arredondo, Longrob and Owens.

20  
21 Defendants contend these claims fail to allege the elements of a  
22 negligence claim under California law (Motion to Dismiss, pp. 21-22).  
23 According to Defendants, these claims "fail the basic test of  
24 apprising any defendant so alleged of what actions or inactions create  
25 the basis for that individual's liability" (*id.*, p. 21).

26 ///

27 "In order to prove facts sufficient to support a finding of  
28 negligence, a plaintiff must show that the defendant had a duty to use

1 due care, that he breached that duty, and that the breach was the  
2 proximate or legal cause of the resulting injury." Hayes v. County of  
3 San Diego, 57 Cal. 4th 622, 629, 160 Cal. Rptr. 3d 684, 305 P.3d 252  
4 (2013) (citations, quotations and brackets omitted). However, a  
5 plaintiff "may plead negligence . . . in general terms." Singer v.  
6 Superior Court of Contra Costa County, 54 Cal. 2d 318, 323, 5 Cal.  
7 Rptr. 697, 353 P.2d 305 (1960) (citation omitted); see also Foltz v.  
8 Johnson, 16 Cal. App. 5th 647, 653 n.2, 224 Cal. Rptr. 3d 506 (2017).  
9 For the reasons stated above, Plaintiff's negligence claims, based on  
10 the allegations supporting his federal claims for failure to protect  
11 and excessive force, are sufficient. See Mendoza v. County of San  
12 Diego, 2018 WL 1185230, at \*5 (S.D. Cal. Mar. 7, 2018) (negligence  
13 claim based on same allegations as cognizable federal excessive force  
14 claim sufficient); see also Young v. County of Los Angeles, 655 F.3d  
15 1156, 1170 (9th Cir. 2011) (plaintiff who sufficiently alleged a  
16 Fourth Amendment excessive force claim also pleaded a sufficient  
17 negligence claim under California law). McFarland v. City of Clovis,  
18 2017 WL 1348934, at \*19 (E.D. Cal. Apr. 10, 2017) ("A peace officer's  
19 use of excessive force may form the basis for a state law negligence  
20 claim.") (citations omitted); Machado v. Nguyen, 2014 WL 2795474, at  
21 \*8 (N.D. Cal. June 19, 2014) (plaintiffs who sufficiently alleged a  
22 constitutional deliberate indifference claim also sufficiently alleged  
23 claims for wrongful death and medical malpractice based on same  
24 factual allegations).

25 ///

26 ///

27 **REQUEST FOR SUBSTITUTION**

1 As indicated above, the Fourth Amended Complaint alleges that  
2 Defendant John Doe #4, a classification deputy, and Defendant John Doe  
3 #5, a supervisor, approved decisions to house Plaintiff in the  
4 vicinity of his "known enemies." Plaintiff seeks to substitute A.  
5 Montoya for Defendant John Doe #4 and Defendant D. Braham for  
6 Defendant John Doe #5 in the Fourth Amended Complaint. The moving  
7 Defendants argue that amendment would be futile because: (1) the  
8 Request for Substitution allegedly is untimely; (2) the Fourth Amended  
9 Complaint assertedly fails to state a cognizable Eighth Amendment  
10 claim against Defendants John Doe #4 and John Doe #5; (3) the claims  
11 against these Defendants allegedly are untimely; and (4) Plaintiff  
12 supposedly previously substituted Defendants Moon and Villa for  
13 Defendants John Does #4 and #5.

14  
15 Defendants first argue that Plaintiff engaged in undue delay in  
16 seeking to substitute Montoya and Braham as Defendants. Defendants  
17 contend that Plaintiff became aware of these Defendants' identities  
18 upon receipt of documents allegedly produced in discovery and served  
19 on Plaintiff on February 19, 2019 ("Defendants' Opposition to  
20 Plaintiff's Motion to Substitute, etc.," p. 3; Declaration of Jonathan  
21 C. Bond & Ex. A attached thereto). Plaintiff contends he became aware  
22 of these Defendants' identities only upon receipt of Defendant  
23 Arredondo's supplemental response to Plaintiff's Interrogatory No. 10,  
24 which Plaintiff assertedly received in September of 2019 (Request for

25 ///

26 ///

1 Substitution, p. 2 & Ex. A-1).<sup>9</sup> The documents upon which Defendants  
 2 rely purportedly show, at most, that Montoya and/or Brahman were  
 3 involved in ordering Plaintiff's rehousing after the alleged  
 4 incidents; these documents do not necessarily indicate Montoya and/or  
 5 Brahman ever approved Plaintiff's housing near "known enemies." Thus,  
 6 Defendants have not demonstrated any lack of diligence by Plaintiff in  
 7 seeking to substitute Montoya and Braham for Doe Defendants.

8  
 9 Defendants also argue that the two-year statute of limitations  
 10 set forth in California Code of Civil Procedure section 335.1 bars  
 11 Plaintiff's claims against Montoya and Brahman. It is true that  
 12 section 335.1 applies to Plaintiff's section 1983 claims as well as to  
 13 his state law claims. See Wilson v. Garcia, 471 U.S. 261, 275 (1985).  
 14 However, Defendants fail to address the possible applicability of  
 15 California Code of Civil Procedure section 352.1, which provides for a  
 16 two-year period of tolling for a claim challenging the conditions of  
 17 confinement where, at the time of accrual, the plaintiff is  
 18 "imprisoned on a criminal charge."<sup>10</sup> Prior to the filing of this  
 19 action, the California Court of Appeal held that section 352.1 does  
 20 not apply to pretrial detainees. See Austin v. Medicis, 21 Cal. App.  
 21 5th 577, 230 Cal. Rptr. 3d 528 (2018). However, in Elliott v. City of  
 22 Union City, 25 F.3d 800, 802-03 (9th Cir. 1994), the Ninth Circuit

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24 <sup>9</sup> In the Court's August 16, 2019 Minute Order ruling on  
 25 Plaintiff's July 15, 2019 motion to compel, the Court inter alia  
 26 ordered Defendant Arredondo to provide a further response to  
 Interrogatory No. 10.

27 <sup>10</sup> State law determines the applicability of tolling  
 28 doctrines for purposes of section 1983 claims. See Hardin v.  
Straub, 490 U.S. 536, 539 (1989); Cervantes v. City of San Diego,  
 5 F.3d 1273, 1275 (9th Cir. 1993).



1 ruled that the predecessor to section 352.1 tolled a claim arising out  
2 of an arrest during the continuous period beginning at the time of the  
3 arrest and concluding with the arrestee's release from prison  
4 following conviction. See also Jones v. Blanas, 393 F.3d 918, 929-30  
5 (9th Cir. 2004), cert. denied, 546 U.S. 820 (2005) (recognizing that,  
6 while "the literal language" of section 352.1 did not apply to the  
7 claims of a civil detainee, principles of equitable tolling could  
8 apply to the claims of "an individual continuously detained under  
9 civil process"). As indicated above, it is unclear whether Plaintiff  
10 should be considered to have been a pretrial detainee or a convicted  
11 prisoner at the time of the incidents. Furthermore, neither side  
12 addresses the issue of tolling during the pendency of a grievance and  
13 neither side addresses the issue of equitable tolling.

14  
15 Defendants also argue that the claims against Montoya and Braham  
16 cannot relate back to the time of filing of the original Complaint  
17 under Federal Rule of Civil Procedure 15(c)(1). However, Defendants  
18 fail to address whether these claims could relate back to the First  
19 Amended Complaint (which asserted claims against fictitious  
20 Defendants). Nor do Defendants address the possible applicability of  
21 California state law relation back rules. See Butler v. Nat.  
22 Community Renaissance of Calif., 766 F.3d 1191, 1201 (9th Cir. 2014)  
23 (because the limitations period derives from state law, a court may  
24 apply either state or federal relation back rules, "whichever applies  
25 the more permissive relation back standard") (citation and quotations  
26 omitted).

27 ///

28 ///

Given these unaddressed issues and unaddressed possibilities, the Court declines to rule at this time that the claims against Montoya and Braham necessarily are time-barred.

Finally, the Court rejects Defendants' specious argument that Plaintiff "already" named John Doe #4 and John Doe #5 as Defendants Moon and Villa. Moon and Villa were substituted for John Does in the Second Amended Complaint, not the Fourth Amended Complaint. See Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1546 (9th Cir. 1989) ("an amended pleading supersedes the original").

## ORDER

The Motion to Dismiss is denied. Within fourteen (14) days of the date of this Order, Defendants Blackstone, Porter, Serrano, Owens,

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1 Arredondo, Walewha, Moon and Villa shall file an Answer to the Fourth  
2 Amended Complaint.

3  
4 The Request for Substitution is granted.

5  
6 IT IS SO ORDERED.

7  
8  
9 DATED: January 22, 2020.

10 

11  
12  
13 JAMES V. SELNA  
UNITED STATES DISTRICT JUDGE

14  
15  
16 PRESENTED this 9th day  
17 of January, 2020, by:

18  
19 /s/  
20 CHARLES F. EICK  
UNITED STATES MAGISTRATE JUDGE